

44 Box 9 - [JGR/*Chadha* re: District of Columbia] (8) - Roberts, John
G.: Files SERIES I: Subject File

THE WHITE HOUSE

WASHINGTON

December 20, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: D.C. Chadha Letters

The Department of Justice Office of Legislative Affairs has asked for our views on draft replies to the letters from Mayor Barry and D.C. Council members David Clarke and Wilhelmina Rolark on the Administration's position on H.R. 3932, the D.C. Chadha bill. You will recall that Barry wrote the President and Clarke and Rolark wrote you on November 15 to protest what was at the time our proposed position. You advised Barry on November 17 and Clark and Rolark on November 21 that their letters had been referred to Justice.

The proposed Justice responses, to be sent over Assistant Attorney General McConnell's signature, do little more than thank the correspondents for their views and formally transmit copies of the Justice report on H.R. 3932 as actually sent to Senator Roth. The response to Clarke and Rolark disavows any criticism of the D.C. Council. Both letters express disappointment that the views of the Department were not sought until very late in the game, note that the legislative veto was a compromise vehicle for which an alternative must be found, and express the hope that the issue may be resolved during the intersession recess.

OK We referred the incoming letters to Justice to keep some distance between the White House and this problem. For the same reason I do not think we should become too involved in redrafting Justice's proposed responses, which are largely unobjectionable in any event. With your approval, however, I will call the attorney at Justice handling this matter and suggest use of a more neutral sobriquet than "the Home Rule Act" in the Clarke and Rolark reply, and some stylistic changes to prevent the last sentence in the Clarke and Rolark letter, which also appears in the Barry letter, from reading as if it were an awkward translation from Bulgarian.



U.S. Department of Justice
Office of Legislative Affairs

DRAFT

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable David A. Clarke
Chairman
Council of the District of Columbia

Honorable Wilhelmina J. Rolark
Chairperson
Committee on the Judiciary
Council of the District of Columbia

Dear Mr. Clarke and Ms. Rolark:

As the Counsel to the President, Fred F. Fielding, indicated in his November 21st letter to you, your correspondence of November 15th has been referred to me for reply. Your letter presented your views on a draft position that the Administration was preparing on H.R. 3932, a bill seeking to correct the constitutional infirmities in the District of Columbia Self Government and Governmental Reorganization Act raised by the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, ___ U.S. ___, 103 S.Ct. 2764 (1983).

Your views on this significant legislation are important to us. Indeed, it is unfortunate that we were never brought into the debate on the bill until the Chairman of the Senate committee with jurisdiction asked the Department for its views. A copy of our formal report to the Senate committee is attached. Our letter presents amendments that would satisfy our concerns. I am hopeful that we can use the Congressional inter-session recess to reach an agreement on the possible amendments to H.R. 3932.

Before closing, there is one other point I want to make in reply to your letter. I hope that you understand that our position on H.R. 3932 does not imply a criticism of the Council of the District of Columbia or its achievements in the criminal justice area. Rather, our position presents our best efforts to amend the Home Rule Act in the wake of Chadha, a decision that removed from the statute a mechanism that purported to control the degree

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DRAFT

of discretion delegated by Congress. This unconstitutional device is no longer a compromise vehicle. It is the alternatives which our letter attempted to address and what our efforts should be directed toward.

Sincerely,

Robert A. McConnell
Assistant Attorney General



DRAFT

U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Marion Barry, Jr.
Mayor
District of Columbia
Washington, D.C. 20004

Dear Mr. Mayor:

As the Counsel to the President, Fred F. Fielding, indicated in his November 17th letter to you, your letter of November 15, 1983 to the President has been referred to me for reply. Your correspondence discusses your position on H.R. 3932, legislation directed to correct the constitutional infirmities in the District of Columbia Self Government and Governmental Reorganization Act raised by the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, __ U.S. __, 103 S.Ct. 2764 (1983).

The Administration appreciates your perspective on this matter and the courtesy your office has extended in advising us of your views. I hope you understand that the Department's position on this legislation was in response to a request for our views from the Chairman of the Senate Committee with jurisdiction over the legislation. As part of the process whereby the Department comments on numerous bills pending before the Congress, our position was determined and reviewed as quickly as possible. It is surprising that neither the House Committee nor the District of Columbia sought the Department's views on this matter, especially since we have always expressed a substantial interest in legislation affecting criminal justice in the District of Columbia.

The issue at stake, the repeal of the legislative veto provisions in current law and determining the proper alternative, is, in a sense, one of first impression. Until the Court's decision in Chadha, the legislative veto was a much used compromise device. It purported to permit Congress to hold in check discretion which had been delegated by law. The Supreme Court's decision, of course, precludes further utilization of this mechanism.

DRAFT

It is the alternatives which our letter attempted to address and what our efforts should be directed toward. Because there is no ready replacement for the legislative veto device, each statute must be carefully examined to determine the appropriate balance of competing interests involved.

Our report to the Senate Committee, a copy of which is enclosed, expresses our position on this issue as it relates to Titles 22, 23 and 24 of the District of Columbia Code. I hope that we can use the inter-session recess period to agree on amendments that we can all support.

Sincerely,

ROBERT A. McCONNELL
Assistant Attorney General

THE WHITE HOUSE

WASHINGTON

November 21, 1983

Dear Mr. Clarke and Ms. Rolark:

Thank you for your letter of November 15, concerning a draft of a letter to Senator William V. Roth, Jr. from Assistant Attorney General Robert A. McConnell. That draft letter discussed H.R. 3932, a bill to amend the District of Columbia Self-Government and Governmental Reorganization Act to correct certain constitutional infirmities in the wake of the Supreme Court's recent decision in Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983). A letter from Assistant Attorney General McConnell concerning H.R. 3932 has now been sent, although with several changes from the draft you reviewed.

I have referred your letter to Assistant Attorney General McConnell for his consideration and direct reply. The Department of Justice is most directly involved in these issues and accordingly is in the best position to respond to your expressed concerns. Thank you for sharing those concerns with us.

Sincerely,

Orig. signed by FFF

Fred F. Fielding
Counsel to the President

The Honorable David A. Clarke
The Honorable Wilhelmina J. Rolark
Council of the
District of Columbia
Washington, D.C. 20004

FFF:JGR:aea 11/21/83
bcc: FFFielding/JGRoberts/Subj/Chron



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COUNCIL OF THE DISTRICT OF COLUMBIA

WASHINGTON, D. C. 20004

15 November 1983

The Honorable Fred Fielding
The President's General Counsel
The White House
Washington, D. C. 20500

Dear Mr. Fielding:

We, this morning, received a draft of a letter which we understand the Administration is prepared to send to the United States Congress advocating that all future changes to titles 22, 23 and 24 of the D.C. Code should be adopted by Congress. We write to you in hopes that you will not take such an action out of concern not only for the disastrous consequences that would occur in terms of Home Rule but also from fear that such an action would negate a crucial element of the local government's ability to protect the safety and security of our citizens.

One of the fundamental obligations of any local government is to protect the public safety. An essential ingredient in meeting this responsibility is the ability of the government to establish policies aimed at achieving this goal and then to develop and enact laws which embody those policies. Congress recognized this basic principle when it lifted the prohibition against the Council of the District of Columbia legislating in the area of local criminal law and specifically requested that we pick up where it left off.

In the four years that have passed since the prohibition was lifted, the city has made great strides in improving the quality of our local criminal laws. Upon receiving the authority to deal with this area of the law, the Council made criminal law reform one of its top priorities. In 1979, when the Congress asked the Council to complete the task of reviewing the local criminal code, the Council established and staffed a special unit of its Committee on the Judiciary in order to undertake this extensive project. In 1980, the Committee on the Judiciary held an unprecedented number of public hearings on the issue of criminal law reform. The hearings were held in each ward of

The Honorable Fred Fielding
15 November 1983
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the city, over 97 witnesses were heard and more than 1,000 pages of written testimony were received. In 1981, additional hearings were held in which more than 50 witnesses testified. In retrospect, it can honestly be said that no other area of the law, in the history of the elected Council, has received greater scrutiny or generated more public involvement.

Throughout this review process, all agencies and departments, both local and federal, that comprise the District's criminal justice system were continuously consulted. The views and wishes of the federal authorities were solicited and taken into consideration in all our actions regarding reform of the criminal law. As you are aware, we began our work by using as a model the report of the Law Revision Commission, as transmitted to us by the Chairman of the Senate Subcommittee on Governmental Efficiency and the Chairman of the House Subcommittee on Judiciary. In their transmittal, the Chairmen said, "In the spirit of home rule, we are delighted to begin the process of transferring jurisdiction of the proposed criminal code to the City Council so that they can complete the task of codification by adding the essential ingredient of their knowledge of the District of Columbia." With respect to the Commission's report, we basically followed the approach that was recommended by the Office of United States Attorney.

The effort spent in this endeavor has been more than justified by the end product. Four years after the transfer of authority, the city can point with pride to its accomplishments in this area. In that time, we have succeeded in:

(1) Completing a comprehensive revision of the city's drug laws, replacing what one United States Attorney referred to as the "least effective narcotics law in the United States" with a modern enforcement scheme that has proven to be extremely effective in combating and controlling the traffic in illegal drugs;

(2) Revamping the local laws governing theft and white collar crimes, thereby closing one of the most egregious gaps in the District's criminal code;

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(3) Strengthening the local bail laws by adopting provisions designed to make the pretrial detention statute a more viable enforcement tool;

(4) Creating and funding a program to provide compensation to innocent victims of violent crime; and

(5) Providing for the wearing of bulletproof vests by Metropolitan Police Department officers.

In addition to these accomplishments, the Council has adopted numerous other laws which have served to enhance and promote law enforcement efforts on the local level. These laws have, among other things, provided greater dispositional alternatives to the judiciary in sentencing, provided a drug paraphernalia law based upon the model endorsed by the federal Drug Enforcement Administration, strengthened the D.C. secondhand and precious-metal-dealers laws, expanded the ambit of the prostitution and solicitation laws to include other-than-oral solicitations, strengthened the child pornography laws of the District, and increased the fees payable under the Criminal Justice Act.

We note that the draft from the Department of Justice makes particular reference to bills pending in the Council about which there is concern. These matters have not passed the Council, and we think that, if any examination is to be truly objective, the better record would be that which has passed. We note also that the draft makes particular reference to a bill which was rejected by the Congress, "The Sexual Assault Reform Act of 1981." Again, if objectivity is to be the standard, you should note that that proposal was developed by the Law Revision Commission and transmitted with positive recommendations by the Congress to the Council. The changes which we made to it were in the conservative direction--such as rejecting the recommendation to legalize incest. Many of these changes in the conservative direction were recommended by law enforcement officials. Similarly, the draft fails to note that the primary thrust of the bill was to expand the definition of

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what was then and now remains rape in the District of Columbia. During the Congressional review period following our return of the measure to the hill, the Department of Justice did not recommend its rejection.

It should be noted that prior to the Council's work, the state of the District of Columbia law with respect to narcotics and white collar crime was so bad that major prosecutions in these areas had to be conducted in the United States District Court pursuant to United States Code.

We point to these achievements because we believe they exemplify the need to keep the Council's authority over the local criminal law in tact. There is no question that Congress shares the local government's commitment to protect the safety of the District's community. The reality, however, is that Congress is a national body. Its members are elected by their constituencies to represent their interests on issues of national concern. As such, it cannot be expected that the same priority would be given to the criminal laws of the District of Columbia, which are primarily a matter of local concern. A true desire to see that the District's criminal laws are given adequate attention would seem to mandate that the authority to revise those laws remain with the body that has the most interest in ensuring that the laws are kept current. While the District's criminal laws are not likely to be crucial to the constituency of every Congressional district, they are of great concern to our local constituency. As elected officials, we have tried to be responsive to our constituents by placing top priority on this issue.

Not only is the interest in local criminal law reform of greater importance to the Council, the structure of the Council may actually be more conducive to effecting changes in the criminal laws. Criminal code reform often involves extremely controversial issues. The Council's 13 members have been very successful in working closely together to resolve such issues. As a result, equitable compromises were reached and the laws were passed. A larger legislative body might not have been able to attain the same degree of success. The difficulties of

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steering such controversial legislation through a larger body is demonstrated by the history of the reform of the local bail laws. The Council was successful in unanimously adopting a provision which among other things extended the maximum period of time that a person could be detained pursuant to the local pretrial detention statute. This same provision was introduced during several consecutive sessions of Congress. However, no consensus was reached and the measure was never passed.

Over the past four years, the Council has gained a tremendous amount of experience in dealing with the criminal code. An expertise has been developed in this area which should not now be disregarded. We believe our technical competence and professionalism in dealing with changes to the criminal code has been proven. Not only have we demonstrated our ability to construct legally sufficient laws in this area, but we have been able to incorporate our knowledge of the District into the law so that it reflects the unique needs of the District. In conclusion, we have exercised our authority responsibly and we can see no justifiable reason for it to even be suggested that the Council should now be deprived of that authority.

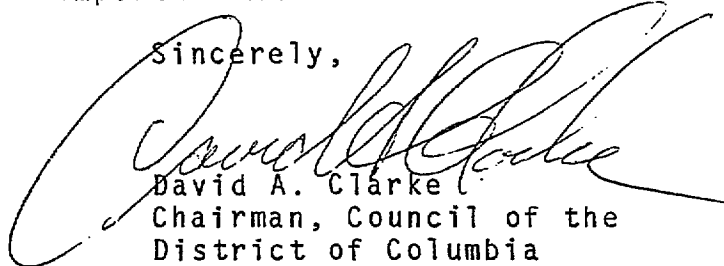
As strong advocates of Home Rule, we are asking for your continued support of the District's ability to practice self-government with respect to the criminal laws of the city. We hope that you will agree with us not to advocate that Congress affirmatively adopt criminal code changes.

We are including a copy of the letter of the Congressional subcommittee chairmen upon the occasion of the transfer of criminal law authority from the Congress to the Council, and an article entitled "Cutting Crime: A Guide to Proposed D.C.

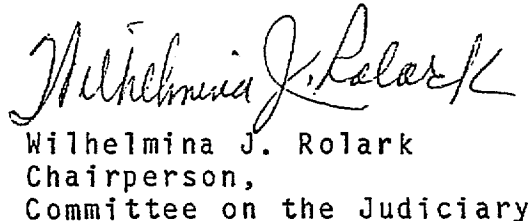
The Honorable Fred Fielding
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Crime Reform", describing in detail the legislative work to that time on the criminal code reform. Thank you for your consideration of this important matter.

Sincerely,



David A. Clarke
Chairman, Council of the
District of Columbia



Wilhelmina J. Rolark
Chairperson,
Committee on the Judiciary

DAC:JCS/bjm

cc: The Honorable Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs
U.S. Department of Justice
10th & Constitution Avenue, NW
Washington, D. C. 20530

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
New Executive Office Building
726 Jackson Place, NW
Washington, D. C. 20503

THE WHITE HOUSE

WASHINGTON

November 17, 1983

Dear Mayor Barry:

Thank you for your letter of November 15 to the President, concerning the Administration's position on H.R. 3932. That position was announced in a letter from Assistant Attorney General Robert A. McConnell.

I have referred your letter to Assistant Attorney General McConnell for consideration and direct reply. The Department of Justice is most directly involved in these issues and accordingly is in the best position to respond to your expressed concerns.

Thank you for sharing these concerns with us.

Sincerely,
Orig. signed by FFF

Fred F. Fielding
Counsel to the President

The Honorable Marion Barry,
Mayor of the
District of Columbia
Washington, D.C. 20004

FFF:JGR:aea 11/17/83
bcc: FFFfielding/JGRoberts/Subj/Chron

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

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|------|-----------------------------------|-----------------------|--------------------------|
| TO | Mike Horowitz | Take necessary action | <input type="checkbox"/> |
| | Connie Horner | Approval or signature | <input type="checkbox"/> |
| | John Roberts ✓ | Comment | <input type="checkbox"/> |
| | John Cooney | Prepare reply | <input type="checkbox"/> |
| | Anna Dixon | Discuss with me | <input type="checkbox"/> |
| | | For your information | <input type="checkbox"/> |
| | | See remarks below | <input type="checkbox"/> |
| FROM | <i>Jan Fox</i> Jan Fox (x4874) | DATE | 11-17-83 |

REMARKS

For your information, attached is Mayor Barry's response to the Justice report on H.R. 3932, D.C. Chadha amendments. The letter I sent you Tuesday was from the D.C. Council.

THE DISTRICT OF COLUMBIA

WASHINGTON, D.C. 20004

November 15, 1983

The Honorable Ronald Reagan
President
United States of America
The White House
Washington, D.C.

Dear Mr. President:

We have been asked to comment on the Administration's draft position statement on H.R. 3932, a bill "to amend the District of Columbia Self-Government and Governmental Reorganization Act, and for other purposes". This legislation is designed to cure possible unconstitutional legislative veto provisions in the District of Columbia's Home Rule Act by changing those veto provisions to joint resolutions of the Congress.

The Administration's position, drafted by the Department of Justice and concurred in by OMB, opposes enactment of H.R. 3932 unless it is amended to provide that laws passed by the Council of the District of Columbia amending Titles 22, 23 and 24 of the D.C. Code, our criminal code, only take effect upon passage of a joint resolution of approval by the Congress.

We are unalterably opposed to the Administration's position. Such an amendment would represent a giant step backward in our quest for Home Rule for the District of Columbia.

The Administration's position is based largely on a theory that the criminal laws of the District would require "special treatment" in any legislation which amends the Self-Government Act to "cure" problems traceable to the decision in Immigration and Naturalization Service v. Chadha 103 S. Ct. 2764 (1983).

Contrary to the Department of Justice's analysis, no reading of the legislative history of section 602(a)(9) of the Self-Government Act or the supporting case law suggests the validity of a theory of "special treatment" of the District's criminal laws under which the jurisdiction and authority of the Council of the District of Columbia over such laws would be curbed drastically or eliminated altogether. The original draft of section 602(a)(9) of the Self-Government Act contained an absolute prohibition on the Council's enacting any law with respect to titles 22, 23 and 24 of the D.C. Code. However, when Public Law 93-198 (the Self-Government Act) was adopted, section 602(a)(9) contained not an absolute prohibition but merely a 24 month postponement of the authority; this was subsequently extended for an additional 24 month period.

Crucial to note, is the fact that the time limitation was just that -- a "time constraint" and not an absolute prohibition. See McIntosh v. Washington, D.C. App., 395 A.2d 744 (1978) and District of Columbia v. Sullivan, D.C. App., 436 A.2d 364, 366 (1981). Congress wanted the Council to have the power to change the criminal laws subject only to a reservation of some time so that it could consider the findings of its Law Revision Commission (for the District of Columbia), which had been asked to examine all the District's criminal laws, before determining whether the Congress itself would amend the District's criminal law. The legislative history and the cases cited above clearly reveal that the Congress of the United States made an affirmative determination that the Council should have this authority, albeit delayed, to enact criminal laws of the District, subject to a one house veto of the Congress.¹

^{1/} see House Committee on the District of Columbia, 93d Cong. Home Rule for the District of Columbia, 1973-1974 (Comm. Print 1974):

1. Rep. Adams (House Floor)

We have said also that there should not be a change in the criminal statutes. The reason for that is that there is proposed before the Committee on the District of Columbia at the present time a commission to review the criminal code. There will be hearings on that, so that for the present time we know where we are with it and can move on that subject without bringing it into this bill, which basically provides a structure of locally elected government. (P. 217)

(footnote continued on next page)

In developing its "special treatment" position, the Department of Justice relies heavily on the case of Palmore v. United States, 411 U.S. 389. Nonetheless, it is instructive to note that Palmore was decided prior to the adoption of the Self-Government Act. But even under Palmore, the Supreme Court of the United States clearly recognized that Congress in the District of Columbia Court Reform and Criminal Procedure Act of 1970 intended "to establish an entirely new court system with functions essentially similar to those of the local courts

footnote 1/ continued

2. Conference Committee Report:

The Conference Committee also agreed to transfer authority to the Council to make changes in Titles 22, 23 and 24 of the District of Columbia Code, effective January 2, 1977. After that date, changes in Titles 22, 23 and 24 by the Council shall be subject to a Congressional veto by either House of Congress within 30 legislative days. The expedited procedure provided in section 604 shall apply to changes in Titles 22, 23 and 24. It is the intention of the Conferees that their respective legislative committees will seek to revise the District of Columbia Criminal Code prior to the effective date of the transfer of authority referred to. (pp. 3013-3014).

3. Rep. Diggs ("Dear Colleague" letter)

The House passed bill prohibited the Council from making any changes in Titles 22, 23 and 24 of the D.C. Code. It was felt that since the District criminal code has not been substantially reviewed and revised for more than seventy years, this provision would hamper constructive revision of the criminal code. Since the District Committee is expected to act in the very near future on H.R. 7412, a bill which I introduced to create a law revision commission for the District, the Conference compromise was adopted. The law revision commission will be given a mandate to turn initially to revision of the D.C. Criminal Code and report its recommendations to the Congress. The Congress will then have a chance to make the much needed revision of the criminal code. This should take no longer than two years. Subsequent to that action, it seems appropriate and consistent with the concept of self-determination that the Council be given the authority to make whatever subsequent modifications in the criminal code as are deemed necessary. (pp. 3041-3042).

found in the 50 states of the Union with responsibilities for trying and deciding those distinctively local controversies that arise under local law, including local criminal laws having little, if any, impact beyond the jurisdiction." 411 U.S. at 409. Therefore, Congress created local courts designed to handle matters of local concern, including local criminal law.

More importantly, in a later case - clearly decided after the effective date of the Self-Government Act - the Supreme Court of the United States in Key v. Doyle, 434 U.S. 66 (1977), not only clarified its decision in Palmore, but also clearly recognized the District's courts as "local courts" which invariably pass on "a law of exclusively local application," and that such a law cannot be construed as a "statute of the United States." See 434 U.S. at 66, 67 and 69. See also NOTE, "Federal and Local Jurisdiction in the District of Columbia," 92 Yale Law Journal 292 (1982), which states in inter alia:

In the Home Rule Act, Congress did in fact delegate to the current District local government the power to define local offenses, and there is little doubt that this delegation is constitutional. The nondelegation justification for continuing to categorize local offense as "crimes against the United States", therefore has been removed. 92 Yale Law Journal at 303.

...Congress acts as a state-like sovereign when enacting local law. D.C. Code matters, therefore, do not "arise under" the "laws of the United States" and D.C. Code offenses are crimes against the District of Columbia, not against the United States. Since the real party in interest in local prosecutions is the District of Columbia, in prosecuting local crimes in the District's United States Attorney acts not in his capacity as a federal officer, but in a local capacity. 92 Yale Law Journal at 294-295.

Finally, one of the arguments advanced for the Administration's position is protection of the federal interest. With all due respect, enactment of H.R. 3932 in no way lessens Congress' inherent authority under Article I, section 8, clause 17 of the Constitution.

What is also disturbing about the Administration's position is that it comes at the last possible moment. The District has actively sought to resolve the issues raised by the Supreme Court decision in INS v. Chadha since August, because the questions about the constitutionality of our Home Rule Charter have effectively precluded the city from issuing revenue bonds. We wanted to have this matter resolved before the Congress adjourned.

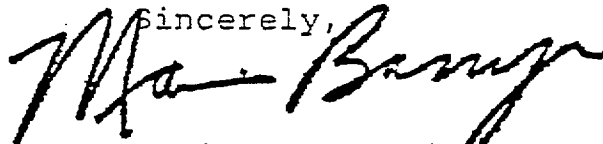
In October the House passed legislation, H.R. 3932. Initially, OMB advised the House District Committee that it had no objection to the legislation. On the day of the floor action, it withdrew its no objection, but did not oppose the legislation at that time nor did the Administration object when the Senate Governmental Affairs Subcommittee on Government Efficiency and the District of Columbia considered virtually identical legislation. Upon hearing from OMB about ten days ago that the Administration had problems with the legislation, we repeatedly sought to obtain a clear statement of its position. Quite frankly, Mr. President, I am distressed to say that members of your Administration were less than candid. They misled me and my staff and it was not until last evening at about 6:45 p.m. that I finally received the Administration's position.

As Mayor of the District of Columbia and an ardent supporter of full home rule for the city, I must state unequivocally that I cannot support your Administration's position. I must note also, that because we will be unable to go to the bond market without some legislation, it will be necessary for the city to continue to borrow from the U.S. Treasury to meet our obligations.

In sum, the Administration's position effectively revokes substantial authority granted the city under the Home Rule Act and, at the same time, significantly undermines the financial independence of the District.

I urge you to reconsider the Administration's position and to support H.R. 3932.

Sincerely,

A handwritten signature in dark ink, appearing to read "Marion Barry, Jr.", written in a cursive, flowing style.

Marion Barry, Jr.
Mayor

In Spite of the Court, the Legislative

Veto Lives On

By MARTIN TOLCHIN

Special to The New York Times

WASHINGTON, Dec. 20 — The legislative veto is alive and well, contrary to a Supreme Court decision and a raft of obituaries.

It continues to thrive in a number of laws recently passed by Congress and signed by President Reagan. The laws may be legally questionable, experts say, but the fact is that the two branches of Government have found agreement on the need for such statutes in certain instances.

"It's like the Queen Mary," said Stanley M. Brand, former counsel to the clerk of the House of Representatives. "You can't turn it around that quickly."

A legislative veto is a 50-year-old device that allows one or both houses of Congress, or even a committee, to block an action of the President or an administrative agency. The veto was held unconstitutional last June when the Supreme Court ruled that it constituted an unwarranted Congressional intrusion into the powers of the executive branch.

Justice Powell's Comment

There were 120 vetoes on the books at the time. Associate Justice Lewis F. Powell Jr. said that the decision, *I.N.S. v. Chadha*, "apparently will invalidate every use of the legislative veto" and that "the breadth of this holding gives one pause."

Since the Supreme Court decision, several laws containing legislative vetoes have been enacted, including the following:

¶The appropriations bill for the Department of Housing and Urban Development and independent agencies gained final Congressional approval six days after the decision, on June 23, and was signed into law on July 12.

It held, among other things, that construction grants by the Environmental Protection Agency were subject to prior committee approval; that the National Aeronautical and Space Administration needed com-

mittee approval before authorizing the leasing or construction of facilities, and that the Federal Home Loan Bank Board needed committee approval before transferring earmarked expenses.

¶The supplemental appropriations bill, signed on July 30, provided that committee approval was required before certain funds could be paid by the Army Corps of Engineers or before the Interior Department could terminate certain programs.

¶The Caribbean Basin Economic Recovery Act, signed on Aug. 5, provided that the President could suspend duty-free treatment and proclaim a special duty rate for Caribbean nations, subject to a Congressional veto.

¶The appropriations bill for the Transportation Department, signed Aug. 15, provided that expenditure of funds for Washington's Union Station needed prior Congressional approval, as did certain actions of the Federal Aviation Administration.

¶A stopgap spending bill approved last October provided that committee approval was required before the Administration could transfer foreign assistance funds from one category to another. Without such a provision, the Administration would be required to obtain full Congressional approval for such a transfer.

Before the Supreme Court decision, legislative vetoes were often opposed by the White House. Those enacted since have been the result of compromises, usually involving how various sums of money are to be spent.

Presidential Disclaimers

Administration officials say the President signed many of the new bills with disclaimers concerning legislative vetoes. Should there ever be a showdown with a committee, they say, the Administration would not feel bound by the legislative veto provisions. However, the officials concede that because Administration agencies will have to return to Congressional committees to seek funds in future years, the agencies have

generally been respectful of committee opinions, whether or not they have the force of law.

The Reagan Administration has no intention of testing such legislation, so long as the compromises hold up, according to Administration officials. Private citizens and organizations may react differently, however.

Last week, arguments were heard in Federal District Court here in a case involving a legislative veto invoked last August by the House Interior Committee. The committee approved a resolution that sought to block the Interior Department from signing a coal-leasing agreement for Federal lands in Montana and North Dakota. Last October, the President signed a stopgap spending bill that incorporated the resolution.

'Are They Constitutional?'

The lawsuit was brought by the National Wildlife Federation and the Wilderness Society, which want to stop the lease sale.

"It may come as a surprise to some observers in town that Congress has continued to enact legislative vetoes after the *Chadha* decision," said Louis Fisher, a specialist in the government division of the Congressional Research Service of the Library of Congress, who has written extensively about the legislative veto.

"Are they unconstitutional?" Mr. Fisher asked rhetorically of the post-*Chadha* legislative vetoes. "By the court's definition they are. Will this change the behavior between committees and agencies? Probably not."

Mr. Fisher predicts that the agencies will, in effect, tell Congress, "As you know, this law is unconstitutional." Then, after everyone agrees, they will all abide by the new law.

"It makes sense for both branches," Mr. Fisher added. "It's a web of understandings and relationships that goes back decades. The legislative veto gives the President a fast track. Without access to the legislative veto, why should members of Congress want to grant a fast-track process to the President?"

THE WHITE HOUSE

WASHINGTON

January 6, 1984

MEMORANDUM FOR FRED F. FIELDING

THRU: RICHARD A. HAUSER
FROM: JOHN G. ROBERTS *JGR*
SUBJECT: D.C. Chadha Bill

The Justice Department Office of Legislative Affairs has asked for our views on a compromise D.C. Chadha proposal submitted by the District. You will recall that the District of Columbia Self-Government and Governmental Reorganization Act contains several unconstitutional legislative vetoes, including a two-house veto of most D.C. Council legislation and a one-house veto of D.C. Council legislation affecting the Criminal Code. Last fall the House passed a bill that would solve the legislative veto problem by requiring Congress to pass a joint resolution signed by the President within 35 working days to block any D.C. Council legislation. The Justice Department objected to this approach in a letter signed by Assistant Attorney General McConnell, proposing instead that while a joint resolution of disapproval would be adequate in most areas, a joint resolution of approval should be required before D.C. Council legislation affecting the Criminal Code is permitted to go into effect.

The District has now proposed that the House-passed bill be modified so that a joint resolution of approval would be required if the President formally objected to proposed D.C. Council legislation. If the President did not object, Congress would have to pass a joint resolution of disapproval to block the Council action.

My preliminary review and preliminary soundings with the Office of Legal Counsel indicate that a bill along these lines would be constitutional. Although at first blush the Presidential objection procedure appears to share many features of the legislative veto, the fact that the President is in the Executive branch makes all the difference in a constitutional sense, particularly since D.C. Council proposals are basically Executive branch proposals. Indeed, historic forms of government of the District of Columbia featured just such an Executive objection mechanism, as did territorial government in the west.

On policy grounds the latest proposal is a significant improvement over the House-passed bill. The compromise would, however, put the President in a difficult position, requiring him to be clearly out front if the Administration wanted to block a D.C. Council proposal. I discussed this with Mr. Hauser and we agreed that the compromise was desirable only if the alternative were the House-passed bill, and even then Justice should consider if the compromise could be revised to substitute the Attorney General for the President. We think Justice should continue to press for its original proposal if that remains a realistic possibility.

If you agree, I will communicate these views to Justice's Office of Legislative Affairs. I recommend against a formal memorandum conveying our thoughts on the ground that we should continue to keep some distance between the White House and this issue.

I should also point out that the actual language proposed by the District is deficient in several respects. For example, the bill provides that if the President objects to a D.C. Council act "both Houses of Congress shall pass a joint resolution approving said act." What the drafters meant of course was that Congress must pass such a resolution if it wants the act to go into effect. Justice is already aware of this and other technical defects in the compromise proposal.



ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS
WASHINGTON, D.C. 20530

December 29, 1983

TO: Joseph diGenova
United States Attorney
for the District of
Columbia

John Roberts
White House Counsel

With respect to the District of Columbia Self-Government and Governmental Reorganizational Act amendments, attached is a proposal we have received from the District of Columbia. Will you please call us with any comments.

Thank you.

John E. Logan
OLA
633-2078



A BILL

To Amend the District of Columbia Self-Government and Governmental Reorganization Act, and for Other Purposes.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That
(a) section 303(b) of the District of Columbia Self-Government and Governmental Reorganization Act is amended to read as follows:

"(b) An amendment to the charter ratified by the registered qualified electors shall take effect upon the expiration of the the thirty-five-calendar-day period (excluding Saturdays, Sundays, holidays, and days on which either House of Congress is not in session) following the date such amendment was submitted to the Congress, or upon the date prescribed by such amendment, whichever is later, unless during such thirty-five-day period, there has been enacted into law a joint resolution, in accordance with the procedures specified in section 604 of this Act, disapproving such amendment. If any case in which any such joint resolution disapproving such an amendment has, within such thirty-five-day period, passed both Houses of Congress and has been transmitted to the President, such resolution, upon becoming law subsequent to the expiration of such thirty-five-day period, shall be deemed to have repealed such amendment, as of the date such resolution becomes law.".

(b) The second sentence of section 602(c)(1) of such Act is amended to read as follows: "Except as provided in paragraph (2), such act shall take effect upon the expiration of the thirty-

day-calendar period (excluding Saturdays, Sundays, and holidays, and any day on which neither House is in session because of an adjournment sine die, a recess of more than three days, or an adjournment of more than three days) beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate, or upon the date prescribed by such act, whichever is later, unless during such thirty-day period, there has been enacted into law a joint resolution disapproving such act. In any case in which any such joint resolution disapproving such an act has, within such thirty-day period, passed both Houses of Congress and has been transmitted to the President, such resolution, upon becoming law subsequent to the expiration of such thirty-day period, shall be deemed to have repealed such act, as of the date such resolution becomes law."

→ (c) The third sentence of section 602(c)(1) of such act is amended to read as follows:

"the provisions of section 604 shall not apply with respect to any joint resolution disapproving any act pursuant to this paragraph".

→ (d) Section 602(c)(2) of such act is amended to read as follows: "(2)(a) In the case of any such act transmitted by the Chairman with respect to any Act codified in titles 22, 23 or 24 of the District of Columbia Code, such act shall take effect at the end of a 60 calendar day review period beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate unless during such period the President of the United States notifies the Mayor, the Speaker of the House of Representatives and the President of the

Senate, in writing, or his objection to the Act.

(b) In a case in which the President of the United States objects to such an act both Houses of Congress shall pass a joint resolution approving said act. ✓

(c) The provisions of Section 604, relating to the expedited procedure for consideration of resolutions, shall apply to joint resolutions of approval as specified in subsection, 602(c)(2).

→ (e) Section 604 of such Act is amended to read as follows:

"Sec 604(a) If the committee to which a resolution has been referred has not reported it at the end of twenty calendar days after its introduction, it is in order to move to discharge the committee from further consideration of any other resolution with respect to the same Council action which has been referred to the committee.

(b) A motion to discharge may be made only by an individual favoring the resolution, is highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same action), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(c) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same action.

(f) Subsections (b) and (c) of section 740 of such Act are amended by deleting in each such subsection the words "resolution by either the Senate or the House of Representatives" and inserting in lieu thereof "joint resolution by the Congress".

(g) Section 740(d) of such Act is amended by deleting "concurrent" and inserting in lieu thereof "joint".

(h) The amendments made by this section shall not be applicable with respect to any law, which was passed by the Council of the District of Columbia prior to the date of the enactment of this Act, and such laws are hereby deemed valid, in accordance with the provisions thereof, notwithstanding such amendments.

Sec. 2. Part F of title VII of such Act is amended by adding at the end thereof the following new section:

"SEVERABILITY

"Sec. 762. If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby."

Sec. 3. Section 164(a)(3) of the District of Columbia Retirement Reform Act is repealed.

98TH CONGRESS
1ST SESSION

S. 1858

To amend the District of Columbia Self-Government and Governmental Reorganization Act, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 20 (legislative day, SEPTEMBER 19), 1983

Mr. MATHIAS (for himself and Mr. EAGLETON) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To amend the District of Columbia Self-Government and Governmental Reorganization Act, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That (a) section 303(b) of the District of Columbia Self-Gov-
4 ernment and Governmental Reorganization Act is amended
5 to read as follows:

6 “(b) An amendment to the charter ratified by the regis-
7 tered qualified electors shall take effect upon the expiration of
8 the thirty-five-calendar-day period (excluding Saturdays,
9 Sundays, holidays, and days on which either House of Con-
10 gress is not in session) following the date such amendment

1 was submitted to the Congress, or upon the date prescribed
2 by such amendment, whichever is later, unless during such
3 thirty-five-day period, there has been enacted into law a joint
4 resolution, in accordance with the procedures specified in sec-
5 tion 604 of this Act, disapproving such amendment. In any
6 case in which any such joint resolution disapproving such an
7 amendment has, within such thirty-five-day period, passed
8 both Houses of Congress and has been transmitted to the
9 President, such resolution, upon becoming law subsequent to
10 the expiration of such thirty-five-day period, shall be deemed
11 to have repealed such amendment, as of the date such resolu-
12 tion becomes law.”.

13 (b)(1) The second sentence of section 412(a) of such Act
14 is amended to read as follows: “Except as provided in the
15 last sentence of this subsection, the Council shall use acts for
16 all legislative purposes.”.

17 (2) The last sentence of section 412(a) of such Act is
18 amended to read as follows: “Resolutions shall be used (1) to
19 express simple determinations, decisions, or directions of the
20 Council of a special or temporary character; and (2) to ap-
21 prove or disapprove, when specifically authorized by an act,
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19 amended by deleting “concurrent” and inserting in lieu
20 thereof “joint”.

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12 specified in this paragraph.”.

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15 (h) Subsections (b) and (c) of section 740 of such Act are
16 amended by deleting in each such subsection the words “res-
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19 Congress”.

20 (i) Section 740(d) of such Act is amended by deleting
21 “concurrent” and inserting in lieu thereof “joint”.

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23 applicable with respect to any law, which was passed by the
24 Council of the District of Columbia prior to the date of the
25 enactment of this Act, and such laws are hereby deemed

1 valid, in accordance with the provisions thereof, notwith-
2 standing such amendments.

3 SEC. 2. Part F of title VII of such Act is amended by
4 adding at the end thereof the following new section:

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6 "SEC. 762. If any particular provision of this Act, or
7 the application thereof to any person or circumstance, is held
8 invalid, the remainder of this Act and the application of such
9 provision to other persons or circumstances shall not be af-
10 fected thereby."

11 SEC. 3. Section 164(a)(3) of the District of Columbia
12 Retirement Reform Act is repealed.

○

THE WHITE HOUSE

WASHINGTON

January 6, 1984

MEMORANDUM FOR FRED F. FIELDING

THRU: RICHARD A. HAUSER

FROM: JOHN G. ROBERTS *JGR*

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note in your call, to be sure

*DONE
1/9*



ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS
WASHINGTON, D.C. 20530

December 29, 1983

TO: Joseph diGenova
United States Attorney
for the District of
Columbia

John Roberts ✓
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OLA
633-2078



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(c) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same action.

98TH CONGRESS
1ST SESSION

S. 1858

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IN THE SENATE OF THE UNITED STATES

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8 the thirty-five-calendar-day period (excluding Saturdays,
9 Sundays, holidays, and days on which either House of Con-
10 gress is not in session) following the date such amendment

(f) Subsections (b) and (c) of section 740 of such Act are amended by deleting in each such subsection the words "resolution by either the Senate or the House of Representatives" and inserting in lieu thereof "joint resolution by the Congress".

(g) Section 740(d) of such Act is amended by deleting "concurrent" and inserting in lieu thereof "joint".

(h) The amendments made by this section shall not be applicable with respect to any law, which was passed by the Council of the District of Columbia prior to the date of the enactment of this Act, and such laws are hereby deemed valid, in accordance with the provisions thereof, notwithstanding such amendments.

Sec. 2. Part F of title VII of such Act is amended by adding at the end thereof the following new section:

"SEVERABILITY

"Sec. 762. If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby."

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7 the application thereof to any person or circumstance, is held
8 invalid, the remainder of this Act and the application of such
9 provision to other persons or circumstances shall not be af-
10 fected thereby."

11 SEC. 3. Section 164(a)(3) of the District of Columbia
12 Retirement Reform Act is repealed.

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